STATE OF MICHIGAN

COURT OF APPEALS

BRIAN POTTER,

Plaintiff-Appellee,

v

RICHARD C. MCLEARY, M.D., GARY AUGUSTYN, M.D., ROBERT DOMEIER, D.O., EMERGENCY PHYSICIANS MEDICAL GROUP, P.C, and ST. JOSEPH MERCY HOSPITAL ANN ARBOR, d/b/a TRINITY HEALTH-MICHIGAN,

Defendants,

and

KRISTYN H. MURRY, M.D. and HURON VALLEY RADIOLOGY, P.C.,

Defendants-Appellants.

BRIAN POTTER,

Plaintiff-Appellee,

v

RICHARD C. MCLEARY, M.D., KRISTYN H. MURRY, M.D., GARY AUGUSTYN, M.D. HURON VALLEY RADIOLOGY, P.C., and ST. JOSEPH MERCY HOSPITAL ANN ARBOR, d/b/a TRINITY HEALTH-MICHIGAN,

Defendants,

and

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February 6, 2007
9:10 a.m.

No. 262529
Washtenaw Circuit Court
LC No. 03-001226-NH

No. 263538
Washtenaw Circuit Court
LC No. 03-001226-NH

Official Reported Version

ROBERT DOMEIER, D.O. and EMERGENCY PHYSICIANS MEDICAL GROUP, P.C.,

Defendants-Appellants.

Before: Wilder, P.J., and Zahra and Davis, JJ.

WILDER, P.J.

In these consolidated appeals, defendants appeal by leave granted the trial court's orders denying their motions for summary disposition pursuant to MCR 2.116(C)(7). The dispositive issue on appeal in this medical malpractice action is whether plaintiff's affidavits of merit complied with the requirements of MCL 600.2912d. Because they did not, we reverse.

The alleged malpractice took place on June 7, 2001. The statute of limitations in medical malpractice cases is two years from the date the claim accrued. MCL 600.5805(6). Presuming the notice of intent was sufficient,[1] the statute of limitations would have been tolled for 182 days from the date of the notice. MCL 600.2912b(1). A notice of intent was sent to defendants Huron Valley Radiology and Kristyn H. Murry, M.D., on May 30, 2003, leaving eight days before the period of limitations expired. A notice of intent was sent to defendants St. Joseph Mercy Hospital Ann Arbor; Robert Domeier, D.O.; and Emergency Physicians Medical Group, P.C. on May 13, 2003, leaving 25 days before the period of limitations expired. The notices tolled the running of the limitations periods, which recommenced on November 30, 2003, and on November 13, 2003, respectively. The limitations period expired on December 8, 2003, for all defendants. Plaintiff's complaint was filed on November 4, 2003.

Plaintiff submitted two affidavits of merit with his complaint. Both were signed by appropriately certified medical professionals. They included specific statements of the standard of care, indications of how that standard was breached, and what actions should have been taken to comply with the standard of care. However, both affidavits are devoid of any statement on proximate cause. See MCL 600.2912d(1)(d). Therefore, "[w]e hold that plaintiff's affidavit was defective and did not constitute an effective affidavit for the purpose of MCL 600.2912d(1) and, therefore, plaintiff filed a complaint without an affidavit of merit sufficient to commence a medical malpractice action." *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003), citing *Scarsella v Pollak*, 461 Mich 547, 553; 607 NW2d 711 (2000) (*Scarsella II*), and *Mouradian v Goldberg*, 256 Mich App 566, 574; 664 NW2d 805 (2003). There is nothing in the record to suggest that a conforming affidavit was filed before December 8, 2003. Therefore, summary disposition is appropriate under MCR 2.116(C)(7) because the action was not properly commenced, and the period of limitations has expired.

[1] Although sufficiency of the notices of intent is raised as an issue, we find it unnecessary to address it under the circumstances.

We reject plaintiff's contention that, under MCL 600.2301, retroactive amendment of the nonconforming affidavit of merit should be permitted so that plaintiff's cause of action would no longer be barred by the statute of limitations. MCL 600.2301 provides:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

In *Mouradian*, this Court, quoting from *Scarsella II*, concluded that the trial court did not abuse its discretion when it denied plaintiff's request to permit the filing of an amended affidavit that would relate back to the date the complaint was filed:

> "Plaintiff contends that he should have been allowed to amend his September 22, 1996, complaint by appending the untimely affidavit of merit. He reasons that such an amendment would relate back, see MCR 2.118(D), making timely the newly completed complaint. We reject this argument for the reason that it effectively repeals the statutory affidavit of merit requirement. Were we to accept plaintiff's contention, medical malpractice plaintiffs could routinely file their complaints without an affidavit of merit, in contravention of the court rule and the statutory requirement, and 'amend' by supplementing the filing with an affidavit at some later date. This, of course, completely subverts the requirement of MCL 600.2912d(1) . . . that the plaintiff 'shall file with the complaint an affidavit of merit,' as well as the legislative remedy of MCL 600.2912d(2) . . . allowing a twenty-eight-day extension in instances where an affidavit cannot accompany the complaint." [*Mouradian, supra* at 575, quoting *Scarsella II, supra* at 550, quoting *Scarsella v Pollak*, 232 Mich App 61, 65; 591 NW2d 257 (1998) (*Scarsella I*).]

We adopt this reasoning here, and find unpersuasive our dissenting colleague's view that the instant case is distinguishable from *Scarsella II* and *Mouradian*. MCL 600.2912d(1) expressly requires that a plaintiff "shall" file an affidavit of merit with the complaint at the commencement of the lawsuit. The purpose of this requirement is "to ensure trustworthy medical expert testimony and to discourage frivolous lawsuits." *Nippa v Botsford Gen Hosp (On Remand)*, 257 Mich App 387, 394; 668 NW2d 628 (2003). To this end, a complaint filed without the requisite conforming affidavit is insufficient to sustain a lawsuit, and therefore, the period of limitations is not tolled under these circumstances. *Scarsella II, supra* at 553. Permitting the plaintiff to amend his nonconforming affidavits by providing the omitted and required statements on proximate cause, and then permitting the amended affidavits to relate back to the initial filing of the complaint, completely subverts the affidavit requirement established by MCL 600.2912d(1), and renders superfluous the specific legislative remedy established in MCL 600.2912d(2) for circumstances where a conforming affidavit of merit cannot accompany the complaint. Moreover, MCL 600.2301 is a statute that applies generally to pending actions or

proceedings, whereas MCL 600.2912d(1) and (2) are statutes that specifically apply to medical malpractice actions. "When two statutes conflict, the one that is more specific to the subject matter prevails over the more general statute." *Craig v Detroit Pub Schools Chief Executive Officer*, 265 Mich App 572, 575; 697 NW2d 529 (2005), citing *Livonia Hotel, LLC v City of Livonia*, 259 Mich App 116, 131; 673 NW2d 763 (2003).

Because this issue is dispositive, we need not reach the other issues raised on appeal.

Reversed.

Zahra, J., concurred.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra